IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 203 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA :

HONOURABLE MR.JUSTICE KS JHAVERI :

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

CHIMANBHAI SURABHAI THAKOR & 1 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

==========

Appearance :
NOTICE NOT RECD BACK for Appellant(s) : 1, THROUGH JAIL for Appellant(s) : 1 – 2.MS CHETNABEN JOSHI for Appellant(s) : 2,
MS MITA S PANCHAL APP for Opponent(s) : 1,

==========

CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 27/11/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE KS JHAVERI)

1.0 This appeal is directed against the judgment and order dated 21st January, 1999 passed by the learned Addl. Sessions Judge, Kheda at Nadiad in Sessions Case No. 200 of 1998 whereby, the appellants – original accused nos. 2 & 3 were convicted for the offence punishable u/s. 302 r/w. Section 34 of the Indian Penal Code [for short, "the I.P.C."] and sentenced to undergo rigorous imprisonment for life with fine of Rs.2000/- each and in default of payment of fine, simple imprisonment for a further period of two years. Both the accused persons were given the benefit of set-off.

2.0 Original accused no. 1 in the aforesaid Sessions Case has also preferred an appeal being Criminal Appeal No. 470 of 2000 against the impugned judgment and order passed by the Court below. The said Appeal has been disposed of by this Court today having become abated, as original accused no. 1 has expired during the pendency of the Appeal. Learned Advocate for the appellants has produced on record a copy of the Death Certificate of

original accused no. 1. The same is taken on record. This appeal has been preferred by original accused nos. 2 & 3.

3.0 The brief facts of the prosecution case are as under;

3.1 Both deceased – Dahyabhai Devjibhai Thakor and deceased – original accused no. 1 were brothers and had become the owners of two different plots of land situated in the outskirts of Village Vajudiya by distribution of their ancestral property. Out of the said two plots of land, deceased – Dahyabhai Devjibhai Thakor had become the owner of a much bigger plot of land as compared to that of deceased – original accused no. 1. Therefore, disputes used to take place between them regarding the same.

3.2 On 05.04.1998, at around 0900 hrs., while deceased – Dahyabhai Devjibhai Thakor was going to a nearby shop in his bicycle, the accused persons chased him. They were having Axe and a sharp-edge weapon (*'Danti'*) in their hands. A few minutes thereafter, the son of deceased –

Dahyabhai Devjibhai Thakor, who was working in a nearby agricultural field, heard shouts of help from the deceased. Therefore, he immediately rushed to the said place. On reaching there, he noticed that the accused persons were inflicting Axe and '*Danti*' blows on the deceased, on account of which the deceased suffered severe bodily injuries. A crowd started to gather at the place of incident. However, by that time, the accused persons fled the scene of offence. In the meanwhile, the son of the deceased realized that his father has expired.

3.3 Therefore, the son of deceased – Dahyabhai Devjibhai Thakor along with the 'Sarpanch' of the Village went to Borsad Police Station and filed a complaint with respect to the aforesaid incident. The said complaint was registered as I – C. R. No. 93 of 1998 for offences punishable u/s. 302, 506(2), 114 of the I.P.C. and Section 135 of the B.P. Act.

3.4 The Investigating Officer went to the scene of offence and performed inquest *'panchnama'. 'Panchnama'* of

the scene of offence was also done and necessary *'muddammal'* articles were collected. *'Marnottar'* form was filled up and arrangement was made for sending the dead body of the deceased for post-mortem. The *'muddamal'* articles so collected were sent to F.S.L. for examination. On receipt of the F.S.L. Report, PM note and other Reports, they were kept in the investigation file.

3.5 Further investigation was carried out and statements of several witnesses were recorded. As cogent evidence was found against the accused persons, they were arrested. Arrest *'panchnama'* was prepared in the presence of *'panchas'* after completing necessary formalities. The clothes worn by the accused persons at the relevant point of time were also seized by way of a separate *'panchnama'*. During the course of interrogation, as the accused persons showed willingness to produce the weapons used in the commission of the alleged offence in question, the same were recovered by way of separate *'panchnamas'* in the presence of *'panchas'*.

3.6 On completion of investigation, charge-sheet was filed against the accused persons in the Court of learned Judicial Magistrate, First Class, Borsad. As the case was exclusively triable by the Court of Sessions, the learned Judicial Magistrate, First Class, Borsad committed the case to the District & Sessions Court, Kheda – Nadiad and the same was numbered as Sessions Case No. 200 of 1998. The matter was transferred to the learned Addl. Sessions Judge for disposal on merits. On production of the accused persons, the learned Addl. Sessions Judge framed the charge and as they pleaded not guilty to the said charge, trial was conducted against them.

4.0 The prove the guilt against the accused persons, the prosecution had examined in all nine witnesses namely, PW – 1 Takhatsinh @ Lalo Dahyabhai Thakor at Exhibit – 10, PW – 2 Dr. Pursottam Ramdas Sharma at Exhibit – 13, PW – 3 Chandrasinh Amarsinh at Exhibit – 17, PW – 4 Ravjibhai Rambhai at Exhibit – 18, PW – 5 Ayubkhan Lalidas at Exhibit – 23, PW – 6 Virsinh Tejsinh at Exhibit – 27, PW – 7 Prabhatbhai Maganbhai at Exhibit – 31, PW – 8

Iqbal Hussain Mahelali Shaikh at Exhibit – 33 and PW – 9 Vinodkumar Muljibhai at Exhibit – 34.

4.1 The prosecution had also relied upon several documentary evidence, more particularly, the evidence in the form of complaint at Exhibit – 12, the *'Panchnama'* of the scene of offence at Exhibit – 19, the PM note at Exhibit – 16, the Inquest *'panchnama'* at Exhibit – 20, the Arrest *'panchnama'* of the accused persons at Exhibits – 32, 29 & 30 respectively and the F.S.L. Report at Exhibit – 37.

4.2 On submission of the closing *'purshis'*, the further statement of the appellant was recorded u/s. 313 of the Code of Criminal Procedure, 1973. After hearing learned counsel for the respective parties, the learned Addl. Sessions Judge passed the impugned judgment and order convicting the appellant and imposing sentence as stated in the earlier part of this judgment. Hence, the present appeal.

5.0 Ms. Chetnaben Joshi learned Advocate for the appellants has submitted that the prosecution has failed to

prove beyond doubt the guilt of the appellants inasmuch as no evidence has come on record to the effect that the alleged injuries in question were caused by which accused person by using which 'weapon'. She has submitted that no prosecution witness has stated in clear terms about the alleged role played by the appellants in the entire incident in question. Thus, when the prosecution has not been able to prove the role played by each of the accused persons in the alleged offence in question, they could not be convicted for the said offence. Hence, the appellants deserve to be acquitted by granting them the benefit of doubt.

5.1 Learned Advocate has further contented that the discovery '*panchnama*' also could not be relied upon since the same is a joint '*panchnama*'. Therefore, the Court below has committed serious error in law in relying upon the same for convicting the appellants for the alleged offence in question.

5.2 Learned Advocate has submitted that if this Court comes to the conclusion that the appellants are guilty for

the alleged offence in question, then by considering the fact that appellant no. 2 herein was of a very young age at the time when the alleged offence was committed and since it appears that he has not inflicted any 'weapon' blow on the deceased, the Court may acquit him from the alleged offence, by taking a lenient view of the matter.

5.3 She has lastly submitted that in the alternative the Court may acquit the appellants from the alleged offence in question by holding the sentence already undergone by the appellants as sufficient since both the appellants have undergone more than eight years of imprisonment.

6.0 Ms. Mita Panchal learned APP has submitted that from the evidence led by PW – 1 Takhatsinh @ Lalo Dahyabhai Thakor at Exhibit – 10 and PW – 3 Chandrasinh Amarsinh at Exhibit – 17, it is clearly established that both these persons are eye-witnesses to the alleged incident in question. She has submitted that the evidence led by these two witnesses clearly prove the guilt of the appellants.

6.1 Learned APP has further submitted that the medical evidence on record in the form of PM note of the deceased at Exhibit – 16 and the deposition of PW – 2 Dr. Pursottam Ramdas Sharma at Exhibit – 13 clearly establish that the deceased died a homicidal death. Thus, the medical evidence on record also supports the case of the prosecution. She has, therefore, submitted that the Court below was completely justified in convicting the appellants for the offence in question. Hence, no interference is required by this Court in this appeal.

7.0 Heard learned counsel for the respective parties and perused the entire oral as well as documentary evidence available on record. From the record, it appears that the entire case of the prosecution mainly rests upon the evidence of PW – 1 Takhatsinh @ Lalo Dahyabhai Thakor at Exhibit – 10 and PW – 3 Chandrasinh Amarsinh at Exhibit – 17 whom the prosecution claims to be “eye-witnesses” to the alleged incident in question apart from the medical evidence on record in the form of PM note at Exhibit – 16 and the oral deposition of PW – 2 Dr. Pursottam Ramdas Sharma at

Exhibit – 13. Now, for ascertaining as to whether the aforesaid claim made by the prosecution is true or not, we shall carefully scrutinize the evidence led by both these witnesses.

8.0 PW – 1 Takhatsinh @ Lalo Dahyabhai Thakor at Exhibit – 10 is the son of the deceased. In his deposition, he has stated that on the date of the alleged incident in question, while he was working in the agricultural field belonging to someone else, he heard the shouts of the deceased and, therefore, he proceeded towards the place from where he had heard the shouts. On reaching the place, he noticed that original accused no. 1 – deceased was having an Axe while the two other accused persons, i.e. the appellants herein, were having '*dantis*' and that the accused persons were inflicting blows with it on the deceased. When he tried to rescue the deceased, the accused persons also attempted to inflict blows on him and, therefore, he ran away from the place of incident. On hearing his shouts for help, a crowd started to gather at that place. However, by that time, the accused persons fled the scene of offence.

8.1 This witness has identified the clothes worn by the deceased at the relevant point of time before the Court below. This witness has been cross-examined at length before the Court below. However, nothing incriminating has come out from his cross-examination which may lead us to believe his evidence to be untrue or unreliable.

9.0 PW – 3 Chandrasinh Amarsinh Thakor at Exhibit – 17 is an independent witness. He has categorically deposed that on the date of the incident while he was standing near a shop located at some distance away from the place of incident, he heard shouts of help. Therefore, he proceeded towards the said place. On reaching there, he noticed that the accused persons were following the deceased and that original accused no. 1 – deceased was having an Axe and the two other accused persons, i.e. the appellants herein were having '*dantis'.* Thereafter, the accused persons caught hold of the deceased and appellant no. 1 - original accused no. 2 inflicted '*danti*' blows on the head and leg portion of the body of the deceased while

appellant no. 2 – original accused no. 3 also inflicted '*danti*' blows on the deceased. Original accused no. 1 – deceased inflicted Axe blow on the back portion of the neck of the deceased. He has further deposed that at that time the son of the deceased, i.e. PW – 1 Takhatsinh @ Lalo Dahyabhai Thakor at Exhibit – 10 had also reached the scene of offence and had tried to rescue the deceased from further assaults. However, at that time, appellant no. 1 – original accused no. 2 followed PW – 1 with the '*danti*' and, therefore, PW – 1 fled the place of incident. By that time, a crowd gathered at that place and the accused persons had fled the scene of offence.

9.1 This witness has also been cross-examined at length before the Court below. However, nothing incriminating has come out from his cross-examination which may lead us to believe his evidence to be untrue or unreliable.

10.0 Thus, from the evidence led by these two witnesses, viz. PW – 1 Takhatsinh @ Lalo Dahyabhai Thakor at Exhibit – 10 and PW – 3 Chandrasinh Amarsinh at

Exhibit – 17, the involvement of the accused persons in the offence in question is established beyond doubt. It is true that PW – 1 Takhatsinh @ Lalo Dahyabhai Thakor at Exhibit – 10 was not in a position to reply to the question put to him in his cross-examination, as to on which part of the body of the deceased, original accused no. 1 – deceased had allegedly inflicted Axe blows. However, it is to be noted that so far as the role played by appellant no. 1 – original accused no. 2 is concerned, PW – 1 has specifically stated in his cross-examination that appellant no. 1 had inflicted *'danti'* blows on the head and leg portion of the body of the deceased. PW – 3 has also narrated in clear terms about the role played by appellant no. 1 – original accused no. 2, which is similar to what has been narrated by PW – 1.

10.1 While examining the veracity of the evidence led by these two witnesses, it has to be kept in mind that the offence in question is allegedly said to have been jointly committed by all the three accused persons simultaneously. Their evidence support each other so far as the description given by them as regards the 'weapon' possessed by each

accused person as well as the role played by appellant no. 1 – original accused no. 2 is concerned. The entire scenario is to be considered in light of the fact that the accused persons were continuously inflicting blows on the deceased with the 'weapons' which they possessed. Therefore, practically, it might not have been possible to notice as to on which part of the body of the deceased which accused person had inflicted blows with which weapon.

10.2 But, when there is agreement in the evidence of these two witnesses on the aspect of description as regards the 'weapon' possessed by each accused person and the role played by one of the accused persons viz. appellant no. 1 – original accused no. 2, in the entire episode, we find their evidence to be convincing and reliable. Thus, merely because one of the witnesses was not able to depose as to on which part of the body of the deceased, original accused no. 1 – deceased had inflicted the Axe blow, the same, in our opinion, would not absolve the accused persons from the criminal liability.

10.3 In above view of the matter, we have no hesitation in holding that these two witnesses are eye-witnesses to the alleged incident in question. Their presence at the scene of offence, at the relevant point of time, is proved beyond doubt and, accordingly, we hold their evidence to be wholly reliable, trustworthy and free from all doubts.

11.0 The medical evidence on record in the form of PM note of the deceased at Exhibit – 16 and the oral evidence of the Doctor – Dr. Pursottambhai Ramdas Sharma who has performed the post-mortem of the deceased and who has been examined as PW – 2 at Exhibit – 13, also support the case of the prosecution. In his deposition, the Doctor has categorically deposed that the injuries sustained by the deceased were possible by the *'muddamal'* weapons – Axe and *'danti'* and that all the injuries were anti-mortem. The aforesaid medical evidence also support the say of the said two witnesses, viz. PW – 1 Takhatsinh @ Lalo Dahyabhai Thakor at Exhibit – 10 and PW – 3 Chandrasinh Amarsinh at Exhibit – 17 regarding the injuries sustained by the deceased on different parts of the body by what kind of a

'weapon' and also regarding the 'weapon' possessed by which accused person. Thus, from the medical evidence on record, it is proved beyond doubt that the deceased died a homicidal death. The F.S.L. Report at Exhibit – 37 also support the case of the prosecution.

12.0 'Motive', which is an essential element behind any criminal act, is present in the case on hand. The son of the deceased – Takhatsinh @ Lalo Dahyabhai Thakor, who has deposed as PW – 1 at Exhibit – 10, has categorically stated about the unhappiness and grudge which the accused persons possessed, on account of the inheritance of a much bigger plot of land by the deceased. This witness has also deposed about the quarrel that took place between the accused persons and the deceased about three to four days prior to the alleged incident in question and also about the filing of the police complaint against him and his deceased father. The aforesaid facts have also been narrated by this witness in the complaint at Exhibit – 12. Hence, the past history of the parties clearly lead us to believe that there was rivalry between them which led to the commission

of the brutal act by the accused persons, which, in our opinion, does not deserve any leniency. Thus, motive behind the offence is also established.

13.0 So far as the contention raised by the appellants regarding joint discovery '*panchnama*' is concerned, the same will not hold any ground in view of the evidence discussed herein above. Simply because a joint discovery '*panchnama*' has been carried out, the Court cannot shut its eyes to the other cogent evidence available on record in the form of depositions of the two eye witnesses, viz. PW – 1 Takhatsinh @ Lalo Dahyabhai Thakor at Exhibit – 10 and PW – 3 Chandrasinh Amarsinh at Exhibit – 17, the medical evidence on record in the form of PM note of the deceased at Exhibit – 16 and the deposition of the Doctor as PW – 2 at Exhibit – 13 and the Report of the F.S.L. at Exhibit – 37.

14.0 In view of the above discussion, we are of the opinion that the prosecution has cogently established the involvement of the appellants in the crime in question beyond doubt. We are in complete agreement with the

reasonings given by and the findings arrived at in the impugned judgment and order and, therefore, find no reasons to interfere with the same. Hence, the appeal deserves to be dismissed.

15.0 For the foregoing reasons, the appeal is dismissed. Office is directed to send the records & proceedings to the trial Court concerned forthwith.

[R. P. DHOLAKIA, J.] [K. S. JHAVERI, J.]

Pravin/*